No. 90-655-CFX
Status: DECIDED

Title: Freeport-McMoRan Inc., et al., Petitioners
v.
K N Energy, Inc.

Docketed:
October 9, 1990

Court: United States Court of Appeals
for the Tenth Circuit

Counsel for petitioner: Rothbaum Jr.,Bernard J.

Counsel for respondent: Ozawa,Steve H., Morris,Robert L.

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Entry	Date	Note	Proceedings and Orders
1	Oct 9 1990	G	Petition for writ of certiorari filed.
2	Nov 20 1990	G	Motion of American Mining Congress for leave to file a brief as amicus curiae filed.
3	Nov 21 1990		Brief amicus curiae of Fertilizer Institute filed.
4	Nov 26 1990		Brief of respondent K N Energy in opposition filed.
5	Nov 28 1990		DISTRIBUTED. January 4, 1991
6	Dec 3 1990	X	Reply brief of petitioners Freeport-McMoRan, et al. filed.
8	Jan 7 1991		REDISTRIBUTED. January 11, 1991
10	Jan 14 1991		REDISTRIBUTED. January 18, 1991
12	Feb 1 1991		REDISTRIBUTED. February 15, 1991
13	Feb 19 1991		Motion of American Mining Congress for leave to file a brief as amicus curiae GRANTED. Justice Souter OUT.
14	Feb 19 1991		Petition GRANTED. Judgment REVERSED. Opinion per curiam. Justice Souter OUT.

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(1)

90-655
No. ———

FILED
OCT 9 1990
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CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

FREEPORT-MCMORAN INC., *et al.*,
Petitioners,

v.

K N ENERGY, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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October, 1990

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QUESTIONS PRESENTED

1. Did *Carden v. Arkoma Associates*, —— U.S. ——, 110 S.Ct. 1015 (1990), abrogate the long-standing rule that the existence of diversity jurisdiction is determined at the time the action is commenced and cannot be ousted by subsequent events?

2. If *Carden* did silently overrule the precept that diversity jurisdiction is not destroyed by events subsequent to the commencement of the action, does the joinder of a nonessential, nondiverse party now constitute an event mandating dismissal of the action?

3. If so, does *Newman-Green, Inc. v. Alfonzo-Larrain*, —— U.S. ——, 109 S.Ct. 2218 (1989) require that an opportunity be afforded to cure the perceived defect by dismissal of the nondiverse party?

STATEMENT PURSUANT TO RULES 14(b) AND 29.1

Two of the parties to the proceeding in the court of appeals no longer exist. On March 30, 1990 Freeport-McMoRan Operating Company merged into its affiliate, Freeport-McMoRan Oil & Gas Company. On April 2, 1990, McMoRan Oil & Gas Company merged into its parent, Freeport-McMoRan Inc. All other parties appear in the caption of the case.*

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* Freeport-McMoran Inc. has no parent company. Its non-wholly owned subsidiaries are petitioner Freeport-McMoRan Oil & Gas Company, Notel, Inc., St. Laurens Harbor Storage Company, Advanced Fertilizers, Inc., American Sulphur Export Corp., Barton-Creek Properties, Inc., C.C. Dill Co., Inc., Freeport Indonesia, Inc., Freeport-McMoRan Cooper Co., Inc., and Freeport McMoRan Insurance Co., Ltd.

The only parties to the proceedings in the court of appeals not appearing on the cover of the petition are Freeport-McMoRan Operating Company and McMoRan Oil and Gas Company. As noted in the text, neither entity any longer exists.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. ——

FREEPORT-MCMORAN INC., *et al.*,
Petitioners,

v.

K N ENERGY, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

INTRODUCTION

Petitioners, Freeport-McMoRan Inc. and Freeport-McMoRan Oil & Gas Company, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit dismissing this action for want of subject matter jurisdiction.

OPINIONS BELOW

The opinion of the court of appeals is reported at 907 F.2d 1022. The final judgment entered by the district court is unpublished. Both are reproduced in the appendix ("app.") at pp. 1a and 13a. The orders of the court of appeals denying rehearing and denying petitioner's motion to dismiss a nonessential party, but staying issuance of that court's mandate pending the filing of a petition for a writ of certiorari in this Court, are reproduced at app. pp. 9a and 11a.

JURISDICTION

The judgment of the court of appeals was entered on July 10, 1990, app. p. 1a. A timely petition for rehearing was denied on August 30, 1990, app. p. 9a. Jurisdiction exists under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES INVOLVED

Article III, sec. 2, cl. 1, of the Constitution provides in pertinent part:

> "The judicial Power shall extend to . . . controversies . . . between Citizens of different States."

28 U.S.C. § 1332(a) provides in pertinent part:

> The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum of $50,000, exclusive of interest and costs, and is between citizens of different states . . . .

28 U.S.C. § 1653 provides:

> Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts.

Rule 20, F.R.Civ.P., provides in pertinent part:

> All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action. . . . . A plaintiff . . . need not be interested in obtaining . . . all the relief demanded.

Rule 21, F.R.Civ.P., provides in pertinent part:

> Misjoinder of parties is not grounds for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just.

Rule 25(c), F.R.Civ.P. provides:

> "In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party."

STATEMENT

McMoRan Oil & Gas Company ("McMoRan") and its parent company, Freeport-McMoRan Inc. ("Freeport"), brought suit against K N Energy, Inc. ("K N") in the United States District Court for the District of Colorado in 1985. At the time the action was filed, McMoRan was the seller under a long-term natural gas purchase contract. McMoRan sought declaratory relief to determine the proper price to be paid under the contract for gas sold pursuant to it and damages for past underpayments. Freeport asserted separate claims in its own right. Subject matter jurisdiction was grounded upon diversity of citizenship.

Freeport is and McMoRan, prior to its merger into Freeport was, a Delaware corporation with its principal place of business in New Orleans, Louisiana. K N is a Kansas corporation with its principal place of business in Denver, Colorado. Petitioners asserted, and K N agreed, that complete diversity therefore existed.

In the years since petitioners' action against K N was filed, changing business conditions in the oil and gas industry required Freeport to conduct reorganizations of its affiliated entities' assets and structure. As part of one aspect of such a reorganization, McMoRan transferred its interest in the contract at issue in the litigation to an affiliate, FMP Operating Company ("FMPO"). FMPO was a Texas limited partnership operated by McMoRan whose limited partners included citizens of virtually every state, including Kansas and Colorado.

In March, 1990, FMPO merged into another affiliate, Freeport-McMoRan Oil & Gas Company ("FMOG"). Pursuant to the merger, FMOG acquired all the relevant interests of FMPO. FMOG, a Delaware corporation with its principal place of business in New Orleans, is diverse to K N.

Each of the transfers and mergers described above was undertaken for business reasons wholly independent from and unrelated to petitioners' action against K N, and no aspect of this restructuring had any impact upon the conduct of that litigation. The only incidental effect which the restructuring may be said to have had was that petitioners' amended their complaint in 1987 to add FMPO as a party. K N raised no objection to the addition of FMPO, and the district court entered an order adding FMPO as a plaintiff as what was thought to be a matter of routine.

Thus, all of petitioners' claims in this litigation were held at the time of the commencement of the action by McMoRan and Freeport, entities diverse to K N and all remaining claims[1] are now held by FMOG, an entity diverse to K N. For a intermediate period, the claims were held by FMPO, an entity which was not diversed to K N.

Petitioners' case against K N was tried by the district court in November, 1988, and resulted in entry of judgment in favor of McMoRan and FMPO. K N appealed.

On July 10, 1990, the court of appeals reversed the judgment of the district court and directed the entire action dismissed for want of subject matter jurisdiction. The court held that, "although complete diversity was present when the complaint was filed," the addition of FMPO as a plaintiff destroyed jurisdiction. App. p. 5a. The court believed this result was compelled by *Carden v. Arkoma Associates, Inc.*, —— U.S. ——, 110 S.Ct.

[1] Certain of petitioners' claims were settled.

1015 (1990), stating that "*Carden* establishes that [FMPO's] addition as the real party in interest destroyed the district court's diversity jurisdiction." App. p. 7a.

This result was announced *sua sponte*, without briefing or argument.

Petitioners sought two forms of reconsideration. First, petitioners requested the court to grant rehearing on the question whether *Carden* overruled, *sub silento*, the long-established rule that diversity jurisdiction is determined at the time the complaint is filed and cannot be ousted by subsequent events. In particular, petitioners noted that diversity jurisdiction had never been thought to be impaired by adding to an existing case a nonessential party, regardless of whether that party was diverse to its adversary.

Second, petitioners filed a motion to drop FMPO as a party. In affidavits and a brief accompanying this motion, petitioners called to the attention of the court the fact that FMPO no longer existed, and that its successor, FMOG, *was* diverse to K N.

The court of appeals denied without comment both the petition for rehearing and the motion to drop FMPO. The court did, however, stay its mandate pending disposition of a timely petition for writ of certiorari.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH THE SETTLED RULE OF THIS COURT THAT DIVERSITY JURISDICTION IS DETERMINED AT THE TIME THE COMPLAINT IS FILED AND IS NOT OUSTED BY SUBSEQUENT EVENTS

Until the decision below, no jurisdictional rule had been more firmly settled than the precept that if diversity jurisdiction existed at the time an action was commenced, it could not, in Justice Story's words, "be divested by any subsequent events." *Clarke v. Mathewson*, 12 Pet. 164, 171 (1838). "Much less," Chief Justice Taft added a century later, "is such jurisdiction defeated by the intervention, by leave of the court, of a party whose presence is not essential to a decision of the controversy between the original parties." *Wichita Railroad & Light Company v. Public Utilities Commission*, 260 U.S. 48, 54 (1922).

This rule, first announced by Chief Justice Marshall in *Morgan's Heirs v. Morgan*, 2 Wheat. 290 (1817), and *Molland v. Torrance*, 9 Wheat. 537 (1824), has never since been questioned in this Court.

The opinion below, however, squarely holds if the party added after the litigation has commenced is not diverse to its adversary "*Carden* establishes that [its] addition as the real party in interest destroys the district court's diversity jurisdiction." App. p. 7a. This is so, even though "complete diversity was present when the complaint was filed." *Id.* p. 5a. This clear holding flatly contradicts the equally clear holding of *Wichita Railroad* and a host of other decisions of the Court. *E.g., St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 295 n. 27 (1938) ("Change of parties by substitution or intervention does not oust the jurisdiction"); *Hardenbergh v. Ray*, 151 U.S. 112, 116 (1894) ("When the original suit was brought . . . the court acquired jurisdiction of the controversy, and no subsequent change of the parties could affect that jurisdiction").

The court of appeals believed *Carden* compelled the result it reached observing that, but for *Carden*, "[t]his case might well have continued on its journey in federal court . . . ." (App. p. 2a).

But nothing in *Carden* suggests that adding a nondiverse party to existing litigation destroys diversity jurisdiction. *Carden* simply reaffirmed the traditional understanding that when the *original* plaintiff is a partnership a federal court is to look to the citizenship of both limited and general partners in determining whether complete diversity existed at the time the complaint was filed.[2] It said nothing about the entirely different issue whether a nondiverse, nonessential party could be added to existing litigation without destroying diversity jurisdiction.

Nor is there the slightest indication anywhere in *Carden* that the Court intended silently to overrule a principle of federal jurisdiction announced in 1817 and adhered to without question since. Indeed, only a few months before *Carden* was announced, the author of the *Carden* opinion had written for the Court that "the distinction between new parties and parties already before the court" is "central" in determining whether federal jurisdiction exists. *Finley v. United States*, —— U.S. ——, 109 S.Ct. 2003, 2006 n.2 (1989).[3] Still less is there any indication *Carden* intended to abrogate so important a tenet of federal jurisdiction without suggesting what rule was to replace it.[4]

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[2] The *Carden* Court opened its opinion by stating the question to be decided: "[W]hether, in a suit brought by a limited partnership of the limited partners must be taken into account to determine diversity of citizenship among the parties." 110 S.Ct. at 1016.

[3] If *Carden* had the effect attributed to it by the opinion below, it plainly overruled both *Wichita Railroad* and *Hardenbergh v. Ray*. It also called the "central distinction" of *Finley*, into serious doubt.

[4] By sharp contrast, when the Court overruled the much-criticized *Enelow-Ettelson* doctrine, it did so explicitly and with careful atten-

If *Carden* did indeed silently work the far-reaching alteration in jurisdictional doctrine which the opinion below attributes to it, the Court should use this opportunity to explore which of its precedents in this area are still binding authority and which are now to be deemed abandoned.

If *Carden* was not intended to abrogate the rule that diversity jurisdiction is determined at the time the complaint is filed, the contrary holding below should be corrected before it sows confusion, and breeds unnecessary litigation, in every diversity case in which an additional plaintiff or defendant is joined after the action has commenced.

II. THE DECISION BELOW RAISES SIGNIFICANT PROBLEMS FOR THE EFFICIENT ADMINISTRATION OF THE BUSINESS OF THE FEDERAL JUDICIARY

The extent of confusion, controversy and needless litigation which the opinion below will generate can hardly be overstated. For almost two centuries this Court has announced, and the lower courts have applied, the clear and straightforward rule that if diversity jurisdiction exists at the time of the filing of the complaint, it exists at the time of the filing of the complaint, it exists throughout the case.[5]

The opinion below holds that *Carden* abolished this "uniform . . . easy to apply test" (13B C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure*, § 3602, p. 452) and replaced it with a rule stating that the addition of a nondiverse party destroys subject matter jurisdiction.[6] The deleterious impact this holding will have upon the sound administration of federal justice is apparent.

It subjects diversity jurisdiction to unrelenting uncertainty in the class of cases for which the constitutional grant of power to create the jurisdiction was most immediately intended: complex commercial litigation having a substantial interstate impact. 1 J. Moore, et al., *Moore's Federal Practice*, ¶ 0.71[3.2] (1990 rev.).[7] Such a rule will force many existing, and all potential, litigants within the Tenth Circuit to choose between the statutory right to a federal court sitting in diversity and the need to sell or transfer assets to a nondiverse entity.

This result will, in turn, nullify, in a large class of cases, the beneficent effects of the liberal joinder and substitution provisions of Rules 20, 21 and 25 which have long been thought to be among the most salutary reforms contained in the Federal Rules. The holding below that *Carden* mandates such results should be corrected before its unfortunate consequences are fastened upon district courts and litigants in the Tenth Circuit and elsewhere.

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tion to the jurisdictional precepts which would thereafter apply. *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 282-83 (1988).

[5] If the original complaint is amended to state a new cause of action which can be brought *only* by someone other than the original plaintiff—as when the original plaintiff has died, his action does not survive him and his personal representative asserts a different action—the question of jurisdiction is determined at that time. *Dunn v. Clarke*, 8 Pet. 1 (1834). This narrow, clearly understood exception was not mentioned by the court of appeals and is inapplicable here.

[6] The opinion below adds that substitution of a party under Rule 25 does *not* affect subject matter jurisdiction. App. p. 6a. No reason was suggested for this bizarre dichotomy, and none comes readily to mind. *Cf., Landress v. Phoenix Mutual Ins. Co.*, 291 U.S. 491, 499 (1934) ("The attempted distinction . . . will plunge this branch of the law into a Serbonian Bog").

[7] It is ironic that the *Gulfstream* Court overruled the *Enelow-Ettelson* doctrine precisely because it *created* jurisdictional uncertainty. 480 U.S. at 278-281.

III. THE DECISION BELOW CONFLICTS WITH THE DECISION OF THIS COURT THAT JURISDICTIONAL DEFECTS MAY BE CURED ON APPEAL

The "defect" in subject matter jurisdiction which the court of appeals believed—correctly or not—it discerned could easily have been remedied by dropping FMPO as a party. Indeed, by the time of the *sua sponte* jurisdictional ruling below FMPO no longer existed. On March 30, 1990, FMPO was merged into petitioner Freeport-McMoRan Oil & Gas Company ("FMOG"), and FMOG, a Delaware corporation, *is* diverse to K N.

Immediately after the opinion below was issued, petitioners filed a motion and affidavits calling these facts to the attention of the court [8] and requesting the court to drop FMPO as a party, to substitute FMOG. This motion rested upon the authority of *Newman-Green Inc. v. Alfonzo-Larrain*, —— U.S. ——, 109 S.Ct. 2218 (1989).

On September 7, 1990, the court, without explanation, denied the motion as "moot." App. p. 11a.

Obviously, the motion was not, and could not have been, "moot." Granting it would have obviated any doubt that subject matter jurisdiction existed and permitted the court of appeals to decide the appeal on its merits.

The action of the court below in refusing even to consider the merits of the motion was either a failure to comprehend the effect of, or a refusal to abide by, the recent and squarely controlling decision of this Court in *Newman-Green*.

The decision below thus "ignored, consciously or unconsciously, the hierarchy of the federal court system." *Hutto v. Davis*, 454 U.S. 370, 375 (1982). *Newman-Green* "is the law, and the decision below cannot be reconciled with it." *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 535 (1983).

[8] Since the jurisdictional issue upon which the dismissal was entered was raised and decided by the court below *sua sponte*, petitioners had no occasion to present these facts to the court at an earlier time.

To require a jurisdictional dismissal of this case, and thereby compel diverse FMOG to refile in the same federal district court the same complaint which its predecessor in interest filed more than five years ago "would impose unnecessary and wasteful burdens on the parties, judges, and other litigants waiting for judicial attention." *Newman-Green*, —— U.S. at ——, 109 S.Ct. at 2225. If *Newman-Green* can be ignored on the facts of this case, it is a dead letter.

CONCLUSION

A writ of certiorari should be granted to review the judgment and opinion below.

Respectfully submitted,

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October, 1990

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Nos. 89-1068, 89-1098

McMoRan Oil and Gas Company, a Delaware corporation; Freeport-McMoRan, Inc., a Delaware corporation; and FMP Operating Company, a Texas Limited Partnership,

Plaintiffs-Appellees/Cross-Appellants,

v.

KN Energy, Inc., a Kansas corporation,

Defendant-Appellant/Cross-Appellee.

Appeal from the United States District Court
For the District of Colorado

D.C. No. 85-A-1081

[Filed Jul. 10, 1990]

Tucker K. Trautman (Lawrence P. Terrell and D. Monte Pascoe with him on the briefs) of Ireland, Stapleton, Pryor & Pascoe, P.C., Denver, CO, for Plaintiffs-Appellees/Cross-Appellants.

Robert L. Morris of Morris, Lower & Sattler (P. Kathleen Lower of Morris, Lower & Sattler; and Steve H. Ozawa of KN Energy, Inc., Lakewood, CO, with him on the briefs), Denver, CO, for Defendant-Appellant/Cross-Appellee.

Before MOORE and McWILLIAMS, Circuit Judges, and BRATTON, District Judge.*

---

* The Honorable Howard C. Bratton, Senior Judge, United States District Court for the District of New Mexico, sitting by designation.

MOORE, Circuit Judge.

Had the Supreme Court recently not decided to "adhere to our oft-repeated rule that diversity jurisdiction in a suit by or against the entity depends on the citizenship of 'all the members,'" *Carden v. Arkoma Assocs.*, —— U.S. ——, 110 S. Ct. 1015, 1021 (1990) (citation omitted), this case might well have continued on its journey in federal court, successfully slipping past Scyllaea. Instead, snared on her rocky shore like the misfortuned seafarer, the action is wrest from our jurisdiction and must be dismissed.

I.

This odyssey began in 1985 when McMoRan Oil & Gas Company, a Delaware corporation with its principal place of business in Louisiana, and its parent company, Freeport-McMoRan Inc., a Delaware corporation with its principal place of business in New York, (McMoRan, collectively), filed suit in federal court in the district of Colorado, against KN Energy, Inc., a Kansas corporation with its principal place of business in Colorado. McMoRan alleged jurisdiction under 28 U.S.C. § 1332 (a)(1). In its suit, McMoRan, an oil and gas production company which sold gas to KN, complained that KN breached the parties' gas purchase contract by failing to pay the renegotiated price provided in the contract. After two years of discovery, trial to the court was set to begin in July 1987.

Shortly before trial, McMoRan sought leave to file a second amended complaint. It became necessary for the court to reschedule the July trial to March 1988, however, without ruling on that motion. In December 1987, McMoRan again moved for permission to file a revised second amended complaint under Fed. R. Civ. P. 15 and 25(c), asserting that additional discovery, a recently decided Tenth Circuit case, and its assignment of the contract to FMP Operating Company, a Texas limited

partnership, necessitated the proposed amendment. The court granted the motion, and McMoRan filed a revised amended complaint in January 1988.

Trial to the court was scheduled finally for November 1988, after three previously set dates were vacated.[1] Three weeks before the November trial, however, KN moved to dismiss the action for lack of subject matter jurisdiction because of the addition of a nondiverse limited partner of FMP Operating Company, Freeport-McMoRan Energy Partners, which was comprised of Colorado and Kansas limited partners.[2] At a subsequent hearing, the court denied the motion, noting that with trial just two weeks off, "at a late point like this, there is sufficient ancillary jurisdiction that the court should proceed." After a two-day trial, the court entered judgment in favor of McMoRan and FMP Operating and awarded $1,602,712.51, based on its interpretation of the contract language "highest price then being paid" but limited monthly escalations to the express language of the contract. McMoRan and KN appealed, raising a variety of issues, all of which are now marooned by the failure of jurisdiction.

II.

Although recognizing our responsibility to oversee limitations on federal jurisdiction, *Koerpel v. Heckler*, 797 F.2d 858, 861 (10th Cir. 1986), McMoRan asseverates that obligation is fully met by looking only to the date on which the initial complaint is filed. If complete diversity exists on that date, subsequent changes like "the

[1] Each rescheduling was necessitated by the district court's busy trial docket.

[2] To its motion KN attached a motion to dismiss previously filed before another judge in the same district. In that case, FMP Operating, the defendant, successfully moved to dismiss the action for lack of subject matter jurisdiction on the ground that some of its limited partners were citizens of Colorado and Kansas, making the partnership nondiverse from KN, the plaintiff.

mere addition" of a party plaintiff will not deprive the court of jurisdiction unless the additional plaintiff was an indispensable party when the complaint was filed. *See, e.g., American Nat. Bank & Trust Co. of Chicago v. Bailey*, 750 F.2d 577, 582-83 (7th Cir. 1984), *cert. denied*, 471 U.S. 1100 (1985). McMoRan maintains that since FMP Operating was not an indispensable party at the outset of the action, the subsequent contract assignment compelling its addition as a party plaintiff does not disturb the initial attachment of diversity jurisdiction. Indeed, because the nature of the action and the right asserted remained the same, McMoRan urges, the court's jurisdiction "should not be re-examined as of a later date." Finally, McMoRan notes in its brief, as general partners,[3] "both McMoRan and FMI, with their general partner responsibilities and authority and significant financial stake in FMPO, continued to have a real interest in the outcome of this litigation."

Before we consider the particular issues of this case, we revisit the principles of 28 U.S.C. § 1332(a)(1) which confers federal jurisdiction "where the matter in controversy exceeds the sum or value of $50,000 exclusive of interests and costs, and is between citizens of different States." The statute requires complete diversity of citizenship; that is, no plaintiff can be a citizen of the same state as any defendant. "Whatever may have been the original purposes of diversity-of-citizenship jurisdiction, this subsequent history [the re-enacted or amended statute] clearly demonstrates a congressional mandate that diversity jurisdiction is not to be available when any plaintiff is a citizen of the same State as any defendant." *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 373-74 (1978) (citation omitted).

While the courts and Congress previously have decided how most artificial entities created by state law will be

[3] McMoRan is the managing general partner, and Freeport-McMoRan is the special general partner of FMP Operating.

treated for purposes of federal diversity jurisdiction, the citizenship of a limited partnership has only recently been resolved. For purposes of determining whether diversity jurisdiction is present, the Court has held during the present term that the citizenship of all of the members of the entity must be consulted. *Carden*, 110 S. Ct. at 1021. Thus, if a limited partner is a citizen of the same state as a party on the other side of the action, diversity jurisdiction is unavailable to try an otherwise non-federal claim.

Regardless of how the parties may characterize their presence or the action, "[s]ince diversity of citizenship is a jurisdictional requirement, the Court is always 'called upon to decide' it." *Id.* at 1021 (quoting *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U.S. 449 (1900)). No action by the parties, by waiver, consent, or stipulation, can intrude on the court's duty to assure its power to render judgment. As courts of limited jurisdiction, we must always be aware that this power emanates solely from the Constitution and Congress and "must be neither disregarded nor evaded." *Owen Equipment*, 437 U.S. at 374.

Hence, although complete diversity was present when the complaint was filed, our inquiry now focuses on whether the addition of a party plaintiff, denominated a substitution under Fed. R. Civ. P. 25(c), destroys the court's subject matter jurisdiction. At the outset, we recognize that when the matter was resolved by the district court, the circuits were divided over how to determine the citizenship of a limited partnership; the action had undergone three years of discovery; and the district court had already devoted considerable time prodding the case toward trial.[4] None of these considerations, however, can

[4] For example, one of the issues on appeal is the court's refusal to permit KN to add witnesses and exhibits shortly before the November trial. The court denied the motion on the grounds that additional time would then be necessary for plaintiffs to respond and a continuance might be necessary.

become the basis for asserting jurisdiction if, in fact, it is destroyed.

In its revised amendment, McMoRan asked the district court to join FMP Operating as a plaintiff under Fed. R. Civ. P. 25(c), which states:

> Transfer of Interest. In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party. Service of the motion shall be made as provided in subdivision (a) of this rule.

"Subdivision (c) of Rule 25 deals with transfers of interest during the course of the action." 3B J. Moore & J. Kennedy, *Moore's Federal Practice* § 25.08, at 25-77 to 25-78 (1987). It presupposes that the *substituted* person was a party to the pending action but no longer maintains the same interest in the outcome as the substituting party. Because Rule 25(c) is procedural, if diversity jurisdiction was established at the time the complaint was filed, the substitution of a nondiverse party to carry on the lawsuit will not affect the court's jurisdiction. Underlying the rule is the desire to preserve the adjudication for the real party in interest in the matter.[5]

However, in this case, FMP Operating was not substituted for McMoRan. The district court made no findings under rule 25(c) either to accept the substitution or to permit, in its discretion, the transferor, McMoRan, to continue in the action. Indeed, McMoRan remained in the litigation as an active participant and prosecutes this appeal. Although McMoRan transferred or assigned its interest in the subject contract to FMP Operating, its continuing presence in the action undermines its argument

[5] In contrast, when a transfer of interests occurs prior to the institution of an action, Fed. R. Civ. P. 17 provides that the action shall be prosecuted in the name of the real party in interest.

that the policy underlying Fed. R. Civ. P. 25(c) can be called upon to maintain the court's diversity jurisdiction.

Instead, FMP Operating was *added* as a party plaintiff. McMoRan transferred its interest in the lawsuit because FMP Operating was the real party in interest to the outcome of the litigation. The pretrial order framing the parties, issues, and relief states that FMP Operating succeeded to the producing properties and gas purchase contract upon which the lawsuit was based. The relief requested was damages for breach of that contract and a declaration of the means to determine the price to be paid for the gas sold under the contract. Given these facts, *Carden* establishes that FMP Operating's addition as the real party in interest destroys the district court's diversity jurisdiction.

Moreover, McMoRan cannot rescued by the doctrine of ancillary jurisdiction on which the district court relied to proceed with the action. Although the district court believed the additional party plaintiff's presence could be moored to this concept and the original action heard, the court's conclusion was in error. The jurisdiction the district court exercised over FMP Operating was not an incident to the principal action; it was the principal action. As the Court has clarified,

> ancillary jurisdiction typically involves claims by a defending party haled into court against his will, or by another person whose rights might be irretrievably lost unless he could assert them in an ongoing action in a federal court. A plaintiff cannot complain if ancillary jurisdiction does not encompass all of his possible claims . . . since it is he who has chosen the federal rather than the state forum and must thus accept its limitations.

Owen Equipment, 437 U.S. at 376. Although the court's exercise of ancillary jurisdiction is within its discretion, "we should be cautious about using elastic and ill-defined

notions of ancillary jurisdiction—a concept not mentioned in Article III—to expand our jurisdiction." *American Nat. Bank & Trust Co.*, 750 F.2d at 581. Because McMoRan chose the federal forum to decide its state law claim, it must be bound by its limitations.

Although considerations of efficiency and judicial economy often inject some flexibility into the otherwise rigid bounds of the rule of complete diversity, these concerns do not alone control. Based on the record before us, FMP Operating failed to establish that it possessed the requisite citizenship to permit the court to proceed to hear the matter. The district court erred in permitting McMoRan to amend the complaint to add a nondiverse plaintiff on the ground that its ancillary jurisdiction could overcome this essential defect. The judgment is therefore REVERSED with directions to dismiss the complaint for lack of jurisdiction over the subject matter.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Nos. 89-1068
89-1098

McMoRan Oil and Gas Company, etc., *et al.*,
Plaintiffs-Appellees,
Cross-Appellants,
v.

KN Energy, Inc.,
Defendant-Appellant.
Cross-Appellee.

ORDER

Filed August 30, 1990

Before HOLLOWAY, Chief Judge, McWILLIAMS, McKAY, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY and EBEL, Circuit Judges, and BRATTON,* District Judge.

The court has for consideration plaintiffs' petition for rehearing and suggestion for rehearing en banc, defendant's response, and plaintiffs' motion for leave to file a reply.

Plaintiffs' motion for leave to file a reply is denied. Further, rehearing is denied by the panel.

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* Honorable Howard C. Bratton, Senior Judge, United States District Court for the District of New Mexico, sitting by designation.

In accordance with Fed. R. App.P. 35(b), the clerk transmitted the suggestion for rehearing en banc to the members of the panel and the judges of the court who are in regular active service. No vote was requested and, therefore, rehearing en banc is denied.

Entered for the Court

/s/ Robert L. Hoecker
ROBERT L. HOECKER
Clerk

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 89-1068
89-1098

MCMORAN OIL AND GAS COMPANY, a Delaware corporation; FREEPORT-MCMORAN INC., a Delaware corporation; and FMP OPERATING COMPANY, a Texas Limited Partnership,

Plaintiffs-Appellees,

v.

KN ENERGY, INC.,

Defendant-Appellant.

ORDER

Filed September 7, 1990

Before MOORE, McWILLIAMS, Circuit Judges, and BRATTON, District Judge.*

This matter comes on for consideration of appellee's motion for stay of mandate pending application for certiorari and request for clarification of status of pending motion to dismiss nondiverse party.

Upon consideration whereof, appellee's motion for stay of mandate is granted through October 9, 1990, and that if on or before that date there is filed with the Clerk of

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* Honorable Howard C. Bratton, Senior Judge, United States District Court for the District of New Mexico, sitting by designation.

this Court a notice from the Clerk of the Supreme Court that appellees have filed a timely petition for writ of certiorari in that Court, the stay shall continue until final disposition in the Supreme Court.

It is further ordered that appellee's motion to dismiss nondiverse party is denied as moot.

Entered for the Court

/s/ Robert L. Hoecker
ROBERT L. HOECKER
Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 85-Z-1081

McMORAN OIL AND GAS COMPANY, a Delaware corporation; FREEPORT-McMORAN INC., a Delaware corporation; and FMP OPERATING COMPANY, a Texas Limited Partnership,

Plaintiffs,

v.

KN ENERGY, a Kansas corporation,

Defendant.

ORDER AND JUDGMENT

[Filed Dec. 28, 1988]

This diversity case was tried from November 17 through November 18, 1988, before the Honorable Zita L. Weinshienk, Judge. The issue was the price of natural gas on and after January 1, 1985, under a "take or pay" contract between plaintiffs and defendant. The trial proceeded to conclusion and the Court made oral findings of fact and conclusions of law which are incorporated herein by reference, as if fully set forth. In addition, the parties filed a Stipulation As To Damages on December 2, 1988. Accordingly, it is

DECLARED AND ADJUDGED that the price of gas under the contract is $4.166 per million British thermal units (MMBtu's), subject to a yearly increase of $.01 per MMBtu's. It is

ORDERED that judgment is entered in favor of plaintiffs McMoran Oil and Gas company, Freeport-McMoran, Inc., and FMP Operating Company, and against defendant K N Energy, Inc., in the amount of $1,602,712.51 plus costs. It is

FURTHER ORDERED that that this judgment shall accrue interest at the rate of 9.20% per annum from the date of this judgment. It is

FURTHER ORDERED that plaintiffs shall have their costs upon the filing of a Bill of Costs with the Clerk of the Court within ten (10) days from entry of this Order and Judgment.

DATED at Denver, Colorado, this 28th day of December, 1988.

BY THE COURT:

/s/ Zita L. Weinshienk
ZITA L. WEINSHIENK
Judge
United States District Court

December 28, 1988

Civil Action No. 85-Z-1081

CERTIFICATE OF MAILING

The undersigned hereby certifies that on the above date copies of ORDER AND JUDGMENT entered by Judge Zita L. Weinshienk and filed on December 28, 1988, were mailed to the following:

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By /s/ P. J. ALLEN
Deputy Clerk

(2)

No. 90-655

FILED

NOV 26 1990

JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

FREEPORT-MCMORAN INC., *et al.*,
Petitioners,

v.

K N ENERGY, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

BRIEF IN OPPOSITION TO THE PETITION

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QUESTIONS PRESENTED

1. Whether the addition as a party plaintiff of a limited partnership with new substantive claims divests a federal court of its diversity jurisdiction where the limited partners are not all diverse to the defendant.

2. Whether the court of appeals erred in declining to exercise its discretion to dismiss a non-diverse, dispensable party whose presence in the litigation "spoils" diversity jurisdiction.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-655

FREEPORT-MCMORAN INC., *et al.*,
Petitioners,

v.

K N ENERGY, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

BRIEF IN OPPOSITION TO THE PETITION

Respondent K N Energy, Inc. ("K N") respectfully requests the Court to deny the petition for a writ of certiorari, originally filed on October 9, 1990, to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in this case on July 10, 1990.[1]

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[1] Pursuant to Rule 29.1 of the Rules of this Court, respondent K N states that it has no parent corporation and has only wholly-owned subsidiaries, none of which has any publicly-held securities.

STATEMENT

This case presents yet another "species of the same generic problem" (*Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 370 (1978)) concerning when a federal court has subject matter jurisdiction to decide state law claims between non-diverse parties. In this action, McMoRan Oil & Gas Company and Freeport-McMoRan Inc. (the "original plaintiffs"), as sellers under a natural gas purchase contract (the "Contract"), sued respondent K N for breach of contract on April 19, 1985. Pet. App. 2a. Both original plaintiffs were Delaware corporations with their principal places of business in Louisiana, and both were diverse to respondent K N, a Kansas corporation with its principal place of business in Colorado. *Id.*

Just a few days after filing the original complaint, McMoRan Oil & Gas Company transferred the Contract to FMP Operating Company ("FMPO"), a Texas limited partnership with limited partners who were Kansas or Colorado citizens and thus were not diverse to K N. Pet. App. 2a-3a. The original plaintiffs, however, did not seek to add FMPO as a party plaintiff until December 1987. *Id.* At that time, allegedly pursuant to Rules 15 and 25(c) of the Federal Rules of Civil Procedure, they moved to amend their complaint, contending that "[i]t ha[d] become necessary to add" FMPO as a party plaintiff because it was the owner of "the producing properties and the gas purchase contract that are the subject of this litigation" (Plaintiffs' Motion for Leave to File Second Amended Complaint (Revised), at ¶ 4(a)); they simultaneously moved to amend the complaint to add two new claims based on the Tenth Circuit's decision in *Martin Exploration & Management Co. v. FERC*, 813 F.2d 1059 (10th Cir. 1987), *rev'd*, 486 U.S. 204 (1988). In Counts Eight and Ten of their amended complaint, which they claimed "ar[o]se directly from the *Martin* decision" (Plaintiffs' Motion for Leave to File Second Amended Complaint (Revised), at ¶ 4(b)), FMPO and the original plaintiffs proceeded on the new theory that *Martin* permitted them to elect the "regulated" price, rather than the then-lower "deregulated" price, for gas sold under the Contract. *Id.*[2]

In January 1988, the district court granted the original plaintiffs' motion to add FMPO as a party plaintiff and to add the new counts. Pet. App. 3a. Before the case went to trial, respondent K N moved to dismiss the action for lack of subject matter jurisdiction. *Id.* It claimed that the addition of FMPO, which had limited partners who were not diverse to respondent K N, and the addition of the new claims divested the court of diversity jurisdiction. *Id.*

The district court denied respondent K N's motion to dismiss the case. Pet. App. 3a. While the district court stated the question as "whether the existence of that limited partner destroys diversity," it declined to dismiss the action because the question arose just weeks before trial; it concluded that "there is plenty of authority that at a late point like this, there is sufficient ancillary jurisdiction that the Court should proceed." *Id.* After trial, the district court entered judgment in part for petitioners and in part for respondent. *Id.*

Both parties appealed to the Tenth Circuit. Before the Tenth Circuit, K N raised and briefed both the jurisdic-

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[2] The Tenth Circuit in *Martin* reviewed certain Federal Energy Regulatory Commission ("FERC") orders requiring producers of natural gas falling within both regulated and deregulated categories under the Natural Gas Policy Act ("NGPA")—so-called "dually qualified" gas—to price the gas as if it were in a deregulated category. The Tenth Circuit in *Martin*, however, disagreed with FERC's interpretation of the NGPA and held that the producer could elect to price its gas under the category, either the regulated or deregulated category, that generated the highest price. 813 F.2d at 1066-70. This decision, before the Supreme Court's reversal, was viewed by the original plaintiffs as "substantially chang[ing] the law applicable to this case." Plaintiffs' Motion for Leave to File Second Amended Complaint (Revised), at ¶ 4(b).

tional issue and the merits of the case. On July 10, 1990, the Tenth Circuit dismissed the action for lack of jurisdiction. Pet. App. 1a-8a. It first revisited the statutory basis for its jurisdiction and noted that 28 U.S.C. § 1332 (a) (1) "requires complete diversity of citizenship." Pet. App. 4a. It further noted that, "[f]or purposes of determining whether diversity jurisdiction is present [where a limited partnership is a party], the Court has held . . . that the citizenship of all of the members of the entity must be consulted." *Id.*, citing *Carden v. Arkoma Associates*, 110 S. Ct. 1015 (1990). It then concluded that, while the "substitution" of a non-diverse party generally does not affect the court's existing diversity jurisdiction, the "addition" of FMPO as a non-diverse party plaintiff destroyed the court's jurisdiction; it rested this conclusion on the fact that FMPO, as the seller under the Contract, was the real party in interest in the litigation. Pet. App. 6a-7a. The court then held that the district court erred in exercising what the district court had characterized as "ancillary jurisdiction" over the case despite the absence of diversity. *Id.* at 7a-8a.

After the court of appeals dismissed the case for lack of subject matter jurisdiction, the original plaintiffs moved the court to dismiss FMPO as a dispensable, non-diverse party and to assume jurisdiction of the case. Pet. App. 12a. The basis for this motion was that, after the parties filed their briefs in the Tenth Circuit, but before oral argument, FMPO had transferred the Contract to a newly formed—and diverse—Delaware corporation, Freeport-McMoRan Oil & Gas Company. Pet. at 5.[3] The court of appeals declined to exercise its discretion to drop FMPO from the case. Pet. App. 12a.

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[3] Freeport-McMoRan Oil & Gas Company has never been formally substituted for FMPO or added as a plaintiff in this case and, accordingly, is not properly before this Court as a petitioner.

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW DOES NOT CONFLICT WITH EITHER THIS COURT'S DECISIONS HOLDING THAT POST-COMMENCEMENT EVENTS GENERALLY DO NOT OUST FEDERAL COURTS OF DIVERSITY JURISDICTION OR THE DECISIONS OF ANY OTHER FEDERAL COURT OF APPEALS

To create a conflict where no conflict exists, petitioners assert that (1) the decision below is contrary to this Court's decisions holding that events subsequent to the commencement of an action generally do not oust a court of diversity jurisdiction and (2) the decision of the Tenth Circuit somehow holds that the Court's recent decision in *Carden v. Arkoma Associates*, 110 S. Ct. 1015 (1990), overruled *sub silentio* that long-standing principle. The opinion below, however, does nothing of the sort. It does not depart from either this Court's decision in *Carden* or the well-settled principles of federal diversity jurisdiction.

In *Carden*, this Court held that, in a suit involving a limited partnership, "the citizenship of the limited partners must be taken into account to determine diversity of citizenship among the parties." 110 S. Ct. at 1016. The court below did not hold, as petitioners suggest (Pet. at 7), that *Carden* overruled the principle that post-commencement events generally do not divest courts of diversity jurisdiction. Indeed, the Tenth Circuit did not even quarrel with that well-settled principle. *See* Pet. App. 6a. Rather, the court below correctly mandated dismissal of the plaintiffs' case because (1) the case fell within a well-established exception to that principle—i.e., that the addition of a non-diverse party who is the real party in interest and makes new substantive claims may require reconsideration of diversity jurisdiction (*see Grady v. Irvine*, 254 F.2d 224, 226 (4th Cir.), *cert. denied*, 358 U.S. 819 (1958); *cf. Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365 (1978)); (2)

the district court should have reconsidered its diversity jurisdiction after the addition of FMPO as a party plaintiff and the filing of new claims; and (3) applying *Carden*'s rule that federal courts must examine the citizenship of all partners in determining whether complete diversity exists, the presence of non-diverse limited partners divested the court of subject matter jurisdiction. Pet. App. 6a-7a.[4]

There is nothing at all extraordinary about this decision. The Tenth Circuit recognized that, as a general matter, the mere substitution of a party under Rule 25(c), after the commencement of a case, does not require reassessment of diversity jurisdiction. Pet. App. 6a. But it also recognized that this is not such a case. *Id.* at 6a-7a.[5] This is a case in which the post-commencement addition of a non-diverse party warranted a jurisdictional reassessment because the added party asserted new claims and held the real stake in the controversy. *See id.*

The Tenth Circuit is not alone in that view. Other federal courts of appeals have held that the addition of a non-diverse party can divest courts of jurisdiction where the amendment "changes the nature of the right asserted and alters the substance of the action." *Grady v. Irvine*, 254 F.2d at 226 (post-commencement substitution of a

[4] Petitioners assert, in a footnote (Pet. at 8 n.5), that the court of appeals did not mention this exception to the general rule that post-commencement events do not oust courts of diversity jurisdiction. Petitioners, however, again misinterpret the decision below. The parties argued the applicability of the exception before the court of appeals (*see* Brief of Defendant-Appellant and Cross-Appellee K N Energy, Inc., at 9-11; Brief of Plaintiffs-Appellees and Cross-Appellants McMoRan Oil & Gas Company, et al., at 7-12), and the court's analysis demonstrates that it dismissed the action based on that exception (Pet. App. 6a-7a).

[5] The court below correctly concluded that petitioners did not "substitute" FMPO as the party plaintiff in this case, but "added" it as an additional party plaintiff who prosecuted the action with the original plaintiffs. Pet. App. 6a-7a.

nondiverse administrator as a party plaintiff and the corresponding amendment of claims divested the court of diversity jurisdiction); *Carlton v. BAWW, Inc.*, 751 F.2d 781, 785 (5th Cir. 1985) (addition of a non-diverse bankruptcy trustee as a party plaintiff with a statutory claim to void fraudulent transfer under the Bankruptcy Code divested the court of diversity jurisdiction); *see also* 13B C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 3608, at 453-57 (1984).[6]

Petitioners provide no persuasive reasons for this Court to review the Tenth Circuit's application of that rule here. The decision below charts no new path. It conflicts with neither the decisions of this Court nor the decisions of any courts of appeals. It simply adheres to "the fundamental precept that federal courts are courts of limited jurisdiction" and that "[t]he limits upon federal jurisdiction, whether imposed by the Constitution or by Congress, must be neither disregarded nor evaded." *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. at 374. There is no need for this Court to review that sound judgment here.[7]

[6] The mere fact that the district court had diversity jurisdiction at one time was no basis for its exercise of "ancillary jurisdiction" over the action, including the new claims, when the parties became non-diverse. As the court below correctly concluded, petitioners could not "be rescued by the doctrine of ancillary jurisdiction" (Pet. App. 7a), having chosen the federal forum (with its jurisdictional limitations) for their state law claims and having changed the nature of their action mid-course. *See Owen Equipment & Erection Co. v. Kroger*, 437 U.S. at 370 (while plaintiff properly brought action against diverse defendant in federal court, court lacked diversity or ancillary jurisdiction to entertain plaintiff's new claim against a non-diverse third party defendant where the plaintiff had chosen the federal forum and where the claim was separate from her original claim). The court below thus declined, for sound reasons, to resort to the " 'elastic and ill-defined notions of ancillary jurisdiction—a concept not mentioned in Article III [of the Constitution]—to expand [its] jurisdiction.' " *Id.* (citation omitted).

[7] Because the decision below correctly applied well-settled principles of diversity jurisdiction, it is quite unlikely to spawn the

II. THE DECISION BELOW DOES NOT CONFLICT WITH THIS COURT'S DECISION IN *NEWMAN-GREEN* THAT COURTS OF APPEALS HAVE THE POWER TO DISMISS NONDIVERSE, DISPENSABLE JURISDICTIONAL "SPOILERS"

The decision below likewise is not in conflict with this Court's decision in *Newman-Green Inc. v. Alfonzo-Larrain*, 109 S. Ct. 2218 (1989). In *Newman-Green*, this Court held "that a court of appeals *may* grant a motion to dismiss a dispensable party whose presence spoils statutory diversity jursdiction." *Id.* at 2220 (emphasis added). Nothing in *Newman-Green* suggests, however, that a court of appeals must exercise that power upon request; to the contrary, this Court emphasized that the federal courts should exercise this power to dismiss such non-diverse parties "sparingly." *Id.* at 2226. The Tenth Circuit's decision not to exercise that power here neither contravenes *Newman-Green* nor raises a significant question worthy of this Court's review.

"confusion, controversy and needless litigation" that petitioners and their amicus predict. Pet. at 8-9; *see also* Brief of the Fertilizer Institute as Amicus Curiae in Support of Petitioner, at 4-5, 10-11.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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November 1990

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(5)

No. 90-655

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

FREEPORT-McMORAN INC., *et al.*,
Petitioners,
v.
K N ENERGY, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

REPLY MEMORANDUM IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-655

FREEPORT-MCMORAN INC., *et al.*,
Petitioners,

v.

K N ENERGY, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

REPLY MEMORANDUM IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Respondent's brief in opposition is a compelling demonstration of the reasons why certiorari should be granted in this case.

(1). Respondent makes no attempt to defend the holding below—doubtless because that holding so completely conflicts with controlling decisions of this Court it is indefensible.

Instead, respondent argues a case which does not exist. This is rendered transparent by comparing the holding

of which review is sought with respondent's revision of it.

Respondent's brief:

> "The court below did not hold . . . that *Carden* [*v. Arkoma Associates*, 110 S. Ct. 1015 (1990)] overruled the principle that post-commencement events generally do not divest courts of diversity jurisdiction."

(Br. p. 5)

But that is *precisely* what the Tenth Circuit held:

> ". . . although complete diversity was present when the complaint was filed, our inquiry now focuses on whether the addition of a [dispensable] party plaintiff . . . destroys the court's diversity jurisdiction . . . Carden *establishes that* [*the addition of a dispensable party after the action has been commenced*] *destroys the district court's diversity jurisdiction.* Pet. App. pp. 5a, 7a. (emphasis supplied).

Carden, of course, "establishes" no such thing.

The holding below could not be clearer, and it could not be more completely in conflict with the settled jurisdictional rule which this Court announced long ago (*Mollan v. Torrance*, 9 Wheat. 537 (1824)), and to which it has since adhered. *E.g., Smith v. Sperling*, 354 U.S. 91, 93 n.1 (1957).

Respondent's wistful assertion (br. pp. 5-6 and n.4) that the court below entered a jurisdictional dismissal of this case on a theory which it never mentioned—the notion that jurisdiction should be reconsidered if a new party asserts a new claim which *only* that party could assert—is, thus, refuted by the very words of the holding below. The Tenth Circuit did not mention the narrow exception which respondent now seeks to inject into its opinion for the very good reason that no new party entered this case asserting a new substantive claim which only that party could possess.

(2). Respondent's assertion that the holding below does not conflict with *Newman-Green, Inc. v. Alfonzo-Larrain*, 109 St. 2218 (1989) because the Tenth Circuit merely decided not to "exercise" its authority to dismiss a dispensable party (br. p. 8) is similarly distorted. The court below did *not* merely decline to exercise this authority. It denied petitioner's *Newman-Green* motion, without comment, as "moot." (pet. app. p. 12).

The motion was plainly not "moot." Granting it would have eliminated the jurisdictional "defect" which the Tenth Circuit (erroneously) believed to exist here.

Respondent offers no justification for this result because none exists.

The importance and substantiality of the holding below cannot be seriously denied. The need for review is indisputable; indeed, it is tellingly shown by respondent's need to rewrite the opinion below in order to defend it.

CONCLUSION

For the foregoing reasons, and the reasons stated in the petition, certiorari should be granted.

Respectfully submitted,

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December, 1990

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SUPREME COURT OF THE UNITED STATES

FREEPORT-McMoRAN INC., ET AL. *v.*
K N ENERGY, INC.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 90–655. Decided February 19, 1991

PER CURIAM.

Petitioners seek review of a decision of the United States Court of Appeals for the Tenth Circuit, holding that a Federal District Court lacked jurisdiction to entertain their diversity action because they added a nondiverse party after filing their complaint. We grant certiorari and reverse the decision of the Court of Appeals.

Petitioners, McMoRan Oil and Gas Company (McMoRan) and its parent company, FreePort-McMoRan, Inc. (Freeport), sued respondent K N Energy, Inc., (K N) for breach of contract in the United States District Court for the District of Colorado. Petitioners claimed that respondent had failed to pay the price for natural gas agreed upon in their contract, and sought both declaratory relief to establish the contract price and damages for past underpayments. Petitioners based federal jurisdiction upon diversity of citizenship. At all times up to and including the filing of the complaint, Freeport and McMoRan were Delaware Corporations with their principal places of business in Louisiana. K N was and is a Kansas corporation with its principal place of business in Colorado.

After suit was filed, petitioner McMoRan transferred its interest in the contract with respondent to a limited partnership, FMP Operating Company (FMPO), for business reasons unrelated to the instant litigation. FMPO's limited partners included citizens of Kansas and Colorado. Accordingly, before trial commenced, petitioners sought leave to amend their complaint to substitute FMPO as a plaintiff

under Rule 25(c) of the Federal Rules of Civil Procedure. The District Court permitted petitioners to add FMPO as a party but did not remove McMoRan as a party. After a bench trial, the District Court held in favor of petitioners, and respondent appealed. The Court of Appeals reversed and directed that the suit be dismissed for want of jurisdiction. The court held that "although complete diversity was present when the complaint was filed," the addition of FMPO as a plaintiff destroyed jurisdiction. 907 F. 2d 1022, 1024 (1990). The court based its holding upon our decision in *Carden* v. *Arkoma Associates*, 494 U. S. —— (1990). The court explained that "*Carden* establishes that [FMPO's] addition as the real party in interest destroys the district court's diversity jurisdiction." 907 F. 2d, at 1025.

Our decision last term in *Carden* considered whether the citizenship of limited partners must be taken into account in determining whether diversity jurisdiction exists in an action brought by a limited partnership. The original plaintiff in *Carden* was the limited partnership; diversity jurisdiction, then, depended upon whether complete diversity of citizenship existed at the time the action was commenced. But nothing in *Carden* suggests any change in the well-established rule that diversity of citizenship is assessed at the time the action is filed. We have consistently held that if jurisdiction exists at the time an action is commenced, such jurisdiction may not be divested by subsequent events. *Mollan* v. *Torrance*, 9 Wheat. 537 (1824); *Clarke* v. *Mathewson*, 12 Pet. 164, 171 (1838); *Wichita Railroad & Light Co.* v. *Public Util. Comm'n of Kansas*, 260 U. S. 48, 54 (1922) ("Jurisdiction once acquired . . . is not divested by a subsequent change in the citizenship of the parties. Much less is such jurisdiction defeated by the intervention, by leave of the court, of a party whose presence is not essential to a decision of the controversy between the original parties" (citations omitted)).

The opinions of the District Court and the Court of Appeals establish that the plaintiffs and defendants were diverse at the time the breach-of-contract action arose and at the time that federal proceedings commenced. The opinions also confirm that FMPO was not an "indispensable" party at the time the complaint was filed; in fact, it had no interest whatsoever in the outcome of the litigation until sometime after suit was commenced. Our cases require no more than this. Diversity jurisdiction, once established, is not defeated by the addition of a nondiverse party to the action. A contrary rule could well have the effect of deterring normal business transactions during the pendency of what might be lengthy litigation. Such a rule is not in any way required to accomplish the purposes of diversity jurisdiction.

Respondent relies on our decision in *Owen Equipment & Erection Co.* v. *Kroger*, 437 U. S. 365 (1978) to support the result reached by the Court of Appeals. There we held that the ancillary jurisdiction of a District Court did not extend to the entertaining of a claim by an original plaintiff in a diversity action against a nondiverse third-party defendant impleaded by the original defendant pursuant to Federal Rules of Civil Procedure 14(a). It casts no doubt on the principle established by the cases previously cited that diversity jurisdiction is to be assessed at the time the lawsuit is commenced.

The motion of American Mining Congress for leave to file a brief as amicus curiae is granted. The petition for a writ of certiorari is granted, and the judgment of the Court of Appeals is

Reversed.

JUSTICE SOUTER took no part in the consideration or decision of this motion and case.

MOTION FILED
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No. 90-655

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

FREEPORT-MCMORAN INC., *et al.*,
Petitioners,

v.

K N ENERGY, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

MOTION OF AMERICAN MINING CONGRESS FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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November 21, 1990

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-655

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Respondent.

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MOTION OF AMERICAN MINING CONGRESS FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The American Mining Congress moves this Court for leave to file the attached brief *amicus curiae* pursuant to Rule 37.2 of the Rules of the Court. Respondent K N Energy, Inc., has refused to consent to the filing of a brief *amicus curiae*.

Founded in 1897, the American Mining Congress is an industry association that encompasses (1) producers of most of America's metals, coal, industrial and agricultural minerals; (2) manufacturers of mining and mineral processing machinery, equipment and supplies; and (3) engineering and consulting

firms and financial institutions that serve the mining industry. Petitioner Freeport-McMoRan is a member.

The American Mining Congress is both a clearinghouse for information and a coordinator for action on behalf of the mining industry in the nation's capital. It keeps its members informed on matters pending in Congress, the Executive Branch and independent agencies, and works for constructive policies that will best enable the mining industry to serve the needs of the nation. It also marshals the cooperative endeavors of mine operators and equipment manufacturers in the interest of health, safety and progress for everyone in the industry. In this regard, it vigorously promotes continuing modernization of mine operations and equipment to enhance safety, health, efficiency and product quality.

The members of the American Mining Congress operate in interstate commerce and from time to time litigate in the federal courts under diversity jurisdiction. Because they are involved in interstate commerce, members of the American Mining Congress are among the intended beneficiaries of federal diversity jurisdiction. "There is little doubt that the development of commerce has been aided by the existence of diversity jurisdiction . . . . " 1 J. Moore, J. Lucas, H. Fink, D. Weckstein & J. Wicker, *Moore's Federal Practice* ¶ 0.71[3.—2] at 701.33. Accordingly, the members have a strong and abiding interest in ensuring the stability and predictability of federal diversity jurisdiction.

This Court should grant American Mining Congress' motion to file the attached brief *amicus* to demonstrate why the petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 21, 1990

QUESTION PRESENTED FOR REVIEW

Can federal diversity jurisdiction, properly established at the date the complaint was filed, be destroyed by the substitution or addition of a non-diverse, affiliated plaintiff?

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BRIEF OF AMERICAN MINING CONGRESS AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

INTEREST OF AMICUS CURIAE

The interest of the American Mining Congress as *amicus curiae* is set forth in the Motion for Leave to File Brief Amicus Curiae, p. i, *supra*.

REASONS FOR GRANTING THE WRIT

1. The Tenth Circuit Erred In Ruling That Federal Diversity Jurisdiction Under 28 U.S.C. § 1332(a)(1), Established At The Date On Which The Complaint Was Filed, Can Be Destroyed By Subsequent Events.

Before the Court is a decision by the United States Court of Appeals for the Tenth Circuit holding that federal diversity jurisdiction, properly invoked under 28 U.S.C. § 1332(a)(1), is destroyed by the addition of a nondiverse party plaintiff, a corporate affiliate of the initial plaintiff. *See McMoRan Oil and Gas Co. v. K N Energy, Inc.*, 907 F.2d 1022 (10th Cir. 1990), Pet. App. A. This decision effectively overrules the longstanding principle of subject matter jurisdiction that "the jurisdiction of the court depends upon the state of things at the time of the action brought, and . . . after vesting, it cannot be ousted by subsequent events." *Mullen v. Torrance*, 22 U.S. (1 Wheat.) 537, 539 (1824). This decision, moreover, conflicts not only with a settled line of decisions by this Court beginning with *Mullen* and reaffirmed in *Smith v. Sperling*, 354 U.S. 91, 93 n.1 (1957). It also conflicts with the law of every other circuit.

The material facts are not in dispute. When this action was filed more than five years ago, complete diversity existed between the parties. During the course of the litigation, which involved a contractual dispute, business conditions unrelated to the litigation caused petitioners to reorganize the structure of their affiliated entities. As part of this reorganization, petitioners transferred their interests in the properties at issue to an affiliated entity, a partnership whose limited partners included citizens in virtually every state, including the state where respondent was

a citizen. Subsequently, this limited partnership merged into another corporate affiliate, whose citizenship is diverse to that of respondent.

Thus, the parties agree that:

(1) The original parties were diverse;

(2) For the period during which the limited partnership owned the interests in the suit, the parties were not diverse;

(3) The parties are now again diverse owing to the final merger; and

(4) All mergers and transfers were undertaken for business reasons wholly unrelated to this case.

Upon these facts, the Tenth Circuit found that "although complete diversity was present when the complaint was filed, our inquiry now focuses on whether the addition of a party plaintiff . . . destroys the court's subject matter jurisdiction." *McMoRan*, 907 F.2d at 1024, Pet. App. 5a. This analysis overlooks clear doctrine that so long as "complete diversity was present when the complaint was filed," the addition or substitution of a party cannot ever "destroy[ ] the court's subject matter jurisdiction." *Id.*

Since 1824 in *Mullen v. Torrance*, *supra*, the rule that diversity jurisdiction is determined at the time the case is filed has sustained federal diversity jurisdiction where a change of domicile created diversity three days before the suit was filed, *see Splint Coal Corp. v. Anderson*, 109 F.2d 896 (6th Cir.), *cert. denied*, 311 U.S. 661 (1940), and where a move terminated diverse state citizenship within a week after the action was commenced, *see Truitt v. Gaines*, 318 F.2d 461 (3d Cir. 1963).

Over the years, this doctrine has only been broadened. Beginning with situations involving an individual simply changing citizenship, *see, e.g., Louisville N.A. & C. Ry. Co. v. Louisville Trust Co.*, 174 U.S. 552 (1899), the rationale has been expanded to include situations in which a party dies and a nondiverse representative is substituted, *see Dunn v. Clarke*, 33 U.S. (8 Pet.) 1 (1834); where initial jurisdiction is secured through removal to federal court, *see Grubbs v. General Electric Credit Corp.*, 405 U.S. 699, 705 (1972); where the merger of corporations results in a change in a corporate party's citizenship, *Cottrell v. Bendix Corp.*, 914 F.2d 1494 (6th Cir. 1990); *Hoefferle Truck Sales, Inc. v. Divco-Wayne Corp.*, 523 F.2d 543 (7th Cir. 1975); where a nondiverse dispensable party intervenes, *see, e.g., Wichita R. & Light Co. v. Pub. Util. Comm'n*, 260 U.S. 48, 53-54 (1922); *American Nat'l Bank & Trust Co. of Chicago v. Bailey*, 750 F.2d 577, 582-83 (7th Cir. 1984), *cert. denied*, 471 U.S. 1100 (1985); and where a *pendente lite* transferee is substituted or joined pursuant to Fed. R. Civ. P. 25(c), *see Smith v. Sperling*, *supra*; *Hardenbergh v. Ray*, 151 U.S. 112, 118-19 (1894). *See generally* 7C C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 1951 at 523 (1986); 13B C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3608 at 449 (1984 & Supp. 1990); 3B J. Moore & J. Kennedy, *Moore's Federal Practice* ¶¶ 25.05, 25.08 at 25-85 (1990) [hereinafter 3B *Moore's Federal Practice*]; 1 J. Moore, J. Lucas, H. Fink, D. Weckstein & J. Wicker, *Moore's Federal Practice* ¶ 0.74[1] at 707.3 (1990 & Supp. 1990) [hereinafter 1 *Moore's Federal Practice*].

The Tenth Circuit in *McMoRan* never directly addresses whether properly vested diversity can be destroyed; thus it offers no rational basis for distinguishing or overruling this settled line of cases. Had it focused on the *Mullen* and *Smith* line of cases, the court would have recognized that the citizenship of the limited partnership is completely irrelevant. It is undisputed that the parties that initiated the litigation had the complete diversity of citizenship required by *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806).

In holding that diversity had been destroyed, the Tenth Circuit relied upon this Court's recent decision in *Carden v. Arkoma Assoc.*, 110 S. Ct. 1015 (1990). In *Carden* the Court held that the citizenship of all partners, general and limited, must be considered when determining federal diversity jurisdiction. *Carden* is inapposite. To be sure, had this case involved a nondiverse limited partnership as an original plaintiff, *Carden* would control. But *Carden* never addresses the question of when diversity of citizenship is evaluated for purposes of subject matter jurisdiction because the facts of *Carden* did not call upon the Court to render that decision.

It is true that "when the [*Carden* issue] was decided by the district court, the Circuits were divided over how to determine the citizenship of a limited partnership." *McMoRan*, 907 F.2d at 1024, Pet. App. 5a. But the issue in this case is not how to evaluate the citizenship of a limited partnership that files suit in diversity. Rather, the issue is whether diversity is lost when a corporate plaintiff merges into its affiliate, a

nondiverse limited partnership, and later merges into a diverse corporate parent.[1]

In *Dery v. Wyer*, 265 F.2d 804, 808 (2d Cir. 1959), the Second Circuit described the need for jurisdictional stability and certainty:

> [that] subsequent events will not work an ouster of jurisdiction . . . stems . . . from the general notion that the sufficiency of jurisdiction should be determined once and for all at the threshold and if found to be present then should continue until final disposition of the action.

This policy "minimizes repeated challenges to the court's subject matter 'jurisdiction,' " and "offers a uniform test that is relatively easy to apply." 13B C. Wright, A. Miller & E. Cooper, *supra*, § 3608 at 452.

This case stands as an example of the inefficiencies and waste that inhere in a contrary rule. After the courts and parties devoted over five years of time, energy, and expense to this litigation—three years of discovery and a full trial and judgment on the merits—the entire action has been dismissed. Moreover, on the facts of this case, petitioners can refile their claims in the federal court that has already decided the case once.

The rule below invites manipulation and abuse by litigants. Litigants preferring state court, for whatever reason and at any stage of the litigation, could

[1] The Tenth Circuit's analysis, moreover, is internally inconsistent in that it considers only the transfer of interest to the limited partnership. If subsequent events can ever destroy diversity, subsequent events, by that same reasoning, should be able to cure the lack of diversity.

take action that fairly casts doubt on diversity. The technique of diversity manipulation would become yet another litigation tactic. *Cf. id.* Moreover, such a rule would require parties to a protracted litigation, like the ones in this case, to make organizational or citizenship decisions based not upon commercial needs, but upon the exigencies of litigation. The policy that in part underlies diversity jurisdiction—promoting interstate commerce—would thereby be undercut. *See generally* 1 *Moore's Federal Practice*, *supra*, § 0.71 [3.—2], at 701.33.

2. The Tenth Circuit's Erroneous Jurisdictional Ruling Is Contrary To The Law In Every Other Circuit, And Thus Requires Supreme Court Intervention To Promote Uniform Federal Jurisdiction.

The Tenth Circuit's decision in this case puts it squarely at odds with decisions in every other circuit. *See Newman-Green, Inc. v. Alfonzo-Larrain*, 109 S. Ct. 2218, 2222 (1989) (resolving circuit disputes).

Every federal court of appeals has ruled, until this point, that valid federal jurisdiction between the original parties is not affected by subsequent events such as the change of citizenship of a party, or the substitution or addition of a party under Fed. R. Civ. P. 25. *See, e.g., Hawes v. Club Ecuestre el Comandante*, 598 F.2d 698, 670 (1st Cir. 1979); *In re Agent Orange Prod. Liability Litigation*, 818 F.2d 145 (2d Cir. 1987); *Brough v. Strathmann Supply Co.*, 358 F.2d 374 (3d Cir. 1966); *Goldsmith v. Mayor & City Council of Baltimore*, 845 F.2d 61 (4th Cir. 1988); *Zurn Indus., Inc. v. Acton Constr. Co.*, 847 F.2d 234 (5th Cir. 1988); *Dean v. Holiday Inns, Inc.*, 860 F.2d 670, 672 (6th Cir. 1988); *Hoefferle Truck Sales, Inc.*, *supra*; *Yeldell v. Tutt*, 913 F.2d 533, 537 (8th Cir.

1990); *Blakemore v. Missouri P.R. Co.*, 789 F.2d 616, 618 (8th Cir. 1986); *Hutchinson v. United States*, 677 F.2d 1322, 1326 n.3 (9th Cir. 1982); *Cabalceta v. Standard Fruit Co.*, 883 F.2d 1553 (11th Cir. 1989); *Prakash v. American University*, 727 F.2d 1174, 1179 n.28 (D.C. Cir. 1984); *Beghin-Say Int'l Inc. v. Ole-Bendt Rasmussen*, 733 F.2d 1568 (Fed. Cir. 1984).

Respondent below relied on a line of cases spawned by *Grady v. Irvine*, 254 F.2d 224 (4th Cir.), *cert. denied*, 358 U.S. 819 (1958). In *Grady*, the plaintiff brought a personal injury action under the court's federal diversity jurisdiction. After his death, his non-diverse estate was substituted as the plaintiff and the complaint was converted to a wrongful death action. 254 F.2d at 226. The court held diversity was destroyed. But as the court makes clear, the loss of diversity was owing to the change in the cause of action. "There is a great difference . . . between a formal substitution of a personal representative to prosecute the action *in aid of the same right asserted* by his decedent and an amendment . . . *which changes the nature of the right asserted* and alters the substance of the action." *Id.* (emphasis added). *See also Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365 (1978).

Thus, *Grady* is inapplicable. This case involves no change in the nature of the right asserted, as required by *Grady*. All that changed was the owner of the interest in the litigation. There is no material difference between this case and *Smith v. Sperling*, *supra*.

The other circuits are thus in agreement that federal jurisdiction is (1) determined at the time the suit begins; and (2) unaffected by subsequent events that

do not alter the underlying cause of action. No court or commentator has suggested directly or indirectly until now that diversity jurisdiction, properly established at the outset of an action, could be destroyed by subsequent events surrounding that same action. The Court should grant the writ of certiorari to avoid disturbing this "deeply rooted understanding . . . particularly when requiring dismissal after years of litigation would impose unnecessary and wasteful burdens on the parties, judges, and other litigants waiting for judicial attention." *Newman-Green*, 109 S. Ct. at 2225 (citing *Mullaney v. Anderson*, 342 U.S. 415 (1952)).

CONCLUSION

For the reasons presented, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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BRIEF OF THE FERTILIZER INSTITUTE AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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BRIEF OF THE FERTILIZER INSTITUTE AS AMICUS CURIAE IN SUPPORT OF PETITIONER

On behalf of its member companies, The Fertilizer Institute submits this brief as *amicus curiae* in support of the petition by Freeport-McMoRan, Inc. for a writ of certiorari to review the decision of the United States Court of Appeals for the Tenth Circuit.[1]

INTEREST OF AMICUS CURIAE

The Fertilizer Institute ("TFI") is a trade association that represents the fertilizer industry in the United States. Approximately 300 companies belong to The Fertilizer Institute, and TFI's members represent approximately 95 percent of the U.S. fertilizer production.

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[1] The petitioners and respondent have consented to the filing of this brief. The letters granting their consent have been filed with the Clerk of the Court.

Many of The Fertilizer Institute's members have established a variety of subsidiaries, joint ventures and partnerships to conduct their business and to market their products throughout the United States. Because the Tenth Circuit's decision could have an extremely disruptive effect on the way TFI's members conduct and structure their business transactions, The Fertilizer Institute has a significant interest in this Court's review of the decision below.

STATEMENT

Freeport-McMoRan Oil & Gas Company ("McMoRan") and its parent company, Freeport-McMoRan, Inc. ("Freeport"), the petitioners here and plaintiffs below, obtained a verdict in their favor in the United States District Court for the District of Colorado after a full trial on the merits in November 1988. Subject matter jurisdiction was based on diversity of citizenship. In particular, at the time the complaint was filed, petitioners were incorporated in Delaware with their principal place of business in New Orleans, Louisiana. Respondent, KN Energy, was incorporated in Kansas with its principal place of business in Denver, Colorado.

While the case was pending, McMoRan reorganized its business and transferred its interest in the subject of this dispute to a limited partnership, FMP Operating Company ("FMPO"), for business reasons that are unrelated to this litigation. FMPO's limited partners included citizens from virtually every state, including Kansas and Colorado. Petitioners amended their complaint to add FMPO as a dispensable, non-diverse party, in conjunction with other amendments to the complaint, and KN raised no objection at the time to this addition of FMPO. This addition of FMPO led eventually to the jurisdictional dismissal of the case by the Tenth Circuit.

Some time after its addition to the case, FMPO merged into another affiliate, Freeport-McMoRan Oil & Gas Company ("FMOG"), a Delaware corporation with its principal place of business in New Orleans. Following this merger, all remaining claims relating to the subject matter of this litigation are held by FMOG, an entity that concededly is diverse to KN Energy. Thus, FMPO existed as a relevant corporate entity for only a brief period, and it had become irrelevant to the litigation during the pendency of the appeals to the Tenth Circuit.

On July 10, 1990, the Court of Appeals for the Tenth Circuit reversed the judgment of the district court and dismissed the entire action for lack of subject matter jurisdiction. 907 F.2d 1022. The court held that although diversity existed when the complaint was filed, the addition of FMPO as a plaintiff destroyed complete diversity among the parties and the jurisdiction that previously existed. The Tenth Circuit based this decision primarily on its interpretation of *Carden* v. *Arkoma Associates, Inc.*, 110 S. Ct. 1015 (1990).

Petitioners sought rehearing on two grounds. First, petitioners contended that contrary to the Tenth Circuit's interpretation, *Carden* did not overrule *sub silentio* the previously established rule that diversity jurisdiction must be determined at the time a complaint is filed and cannot be ousted by subsequent events. Second, petitioners filed a motion to dismiss FMPO as a party, since FMPO no longer existed and its successor, FMOG, admittedly was and is diverse to KN Energy. The Tenth Circuit denied rehearing and declined to dismiss FMPO, but the court did stay its mandate pending disposition of a timely petition for writ of certiorari.

REASONS FOR GRANTING THE WRIT

This Court should review the decision below for three reasons. *First*, the Tenth Circuit's decision conflicts with the decisions of this Court and other circuits holding that diversity must be determined at the time a complaint is filed and that diversity is not ousted by subsequent events. The Tenth Circuit dismissed the case below because complete diversity was destroyed, long after the filing of the litigation, by a subsequent change in corporate structure that was wholly unrelated to the lawsuit. The court based its decision on an erroneous application of *Carden*, a case dealing solely with the question of *how*, not *when*, to determine the citizenship of a limited partnership. By interpreting *Carden* to require that a case be dismissed when subsequent events affect diversity, the Tenth Circuit has carved out a new and far-reaching rule that is fundamentally inconsistent with the long line of precedent regarding the time for determining diversity.

Second, by declining to dismiss FMPO as a dispensable, non-diverse party, the Tenth Circuit's decision also conflicts with the recent holding of this Court in *Newman-Green, Inc.* v. *Alfonzo-Larrain*, 109 S. Ct. 2218 (1989). In that decision, this Court held that a court of appeals can and should dismiss a dispensable, non-diverse party on appeal, particularly where the failure to correct a jurisdictional defect by dismissal would cause a waste of time and judicial resources. *Newman-Green* is remarkably applicable in this case, where, before dismissal, there was a full trial on the merits and a verdict rendered in the district court. Dismissal here will only result in forcing the petitioners to refile and relitigate an identical lawsuit, to the extent they are still able to do so.

Third, the Tenth Circuit's decision will have immediate adverse consequences for the conduct of business as well as litigation. If the Tenth Circuit's rule stands, businesses in that circuit will be forced immediately to conform their business relationships to the new rule and forego implementing necessary and prudent business decisions or changes in corporate structure. Otherwise, businesses in the Tenth Circuit would jeopardize the jurisdictional basis and risk dismissal of any cases they have pending in federal court. The Tenth Circuit's decision would thus pose an unwarranted and unnecessary constraint on countless businesses, and especially on large entities with complex corporate structures, which are frequently required to make changes in business relationships and structures for reasons that are wholly unrelated to existing or potential litigation.

In addition to forcing an immediate change in business conduct, the Tenth Circuit's decision will create widespread uncertainty with regard to previously well-settled procedural rules governing diversity and would result in a needless waste of judicial resources. Prior to the decision below, courts uniformly resolved jurisdictional questions concerning diversity, and thus established the appropriate forum for the litigation, at the inception of a lawsuit. For businesses caught unaware by the Tenth Circuit's new rule or unable to avoid changing their corporate structure, the decision below will expose them to disruptive and potentially dispositive jurisdictional challenges at any stage in their litigation proceedings. Indeed, all cases in federal courts bound by the Tenth Circuit rule would be subject to the threat of dismissal, should subsequent events destroy complete diversity, even after years of discovery or a verdict has been rendered. As is apparent in this case, such procedural disruption would pose unnecessary and wasteful burdens on the parties, the judges, and other litigants awaiting judicial attention. *See Newman-Green*, 109 S. Ct. at 2220.

I. THE TENTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS REGARDING SIGNIFICANT JURISDICTIONAL ISSUES.

The decision below presents at least two conflicts with prior decisions of this Court and lower courts regarding the issue of whether post-filing events divest federal courts of diversity jurisdiction during the pendency of a lawsuit. First, the Tenth Circuit's decision—that a subsequent change in corporate structure and the addition of a non-diverse subsidiary necessarily destroys diversity jurisdiction—conflicts with this Court's decision in *Carden* v. *Arkoma Associates*, 110 S. Ct. 1015 (1990). Before this Court decided *Carden*, the federal courts had adopted conflicting approaches for determining the citizenship of a limited partnership. *Carden* resolved that conflict by holding that courts must consider the citizenship of all the members in a limited partnership when the courts determine whether complete diversity exists between the plaintiffs and defendants in an action. 110 S. Ct. at 1021.

The Tenth Circuit significantly extended this holding in the decision below, and in so doing, has relied on *Carden* to create an entirely new rule, contrary to this Court's decision. Specifically, after the court of appeals concluded that some of FMPO's partners would not be diverse to KN Energy, the Tenth Circuit went on to hold that "*Carden* establishes that FMP Operating's *addition* as the real party in interest destroys the district court's diversity jurisdiction" *after* the filing of the litigation. 907 F.2d at 1025 (emphasis added). The Tenth Circuit further implied that the Constitution compelled this application of *Carden*, and this dismissal based on subsequent events, because the scope of diversity jurisdiction is defined by Article III and by Congress and cannot be changed by the courts. *Id.* at 1024.

This holding fundamentally misconstrues *Carden*. The Supreme Court's decision in *Carden* dealt with *how* to

determine the citizenship of a limited partnership for diversity purposes at the outset of a case. *Carden* did not address, nor did the facts require it to consider, the appropriate *time* for determining diversity.[2] Given the actual holding and the facts of *Carden*, there is no basis for the Tenth Circuit's extension of *Carden* to hold that diversity existing at the time a complaint is filed must be divested by subsequent events, such as the addition of a limited partnership as a party.

Second, the Tenth Circuit's decision is sharply inconsistent with numerous decisions by this Court and other circuits that diversity must be determined at the time a complaint is filed and that once established, diversity jurisdiction is not divested by subsequent events. This Court recognized long ago the general principle that the existence of diversity jurisdiction should be determined on the basis of facts and citizenship pertinent at the time an action is filed. *Clark* v. *Mathewson*, 12 Pet. 164, 171 (1838). Since that time, other courts have uniformly applied this principle and held that many other types of *subsequent* events have no effect on jurisdiction, including the intervention of a non-diverse dispensable party,[3] the substitution or joinder of a *pendente lite* transferee,[4]

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[2] Other lower courts have interpreted *Carden* in this way as well. *See, e.g., Northern Trust Co.* v. *Bunge Corp.*, 899 F.2d 591, 594 (7th Cir. 1990) (citing *Carden* for the principle that citizenship for a limited partnership is determined by that of the individual partners).

[3] *See, e.g., Wichita R. & Light Co.* v. *Public Utilities Commission*, 260 U.S. 48, 53-54 (1922); *Harris* v. *Illinois-California Express, Inc.*, 687 F.2d 1361, 1366-1368 (10th Cir. 1982); *American National Bank & Trust Co. of Chicago* v. *Bailey*, 750 F.2d 577, 582-83 (7th Cir. 1984), *cert. denied*, 471 U.S. 1100 (1985); *Gaines* v. *Dixie Carriers, Inc.*, 434 F.2d 52, 54 (5th Cir. 1970).

[4] *See, e.g., Smith* v. *Sperling*, 354 U.S. 91, 93 & n.1 (1957); *Fred Harvey, Inc.* v. *Mooney*, 526 F.2d 608 (7th Cir. 1975); *Television Reception Corp.* v. *Dunbar*, 426 F.2d 174, 177-178 (6th Cir. 1970); *Ransom* v. *Brennan*, 437 F.2d 513 (5th Cir.), *cert. denied*, 403

changes of citizenship, or even a reduction of the amount actually in controversy.[5]

In fact, just prior to the *Carden* decision, this Court reaffirmed the principle that "the existence of federal jurisdiction ordinarily depends on the facts as they exist when the complaint is filed." *Newman-Green*, 109 S. Ct. at 2222. In *Newman-Green*, this Court also recognized that there were only limited exceptions to this principle, citing, for example, 28 U.S.C. § 1653 (allowing defective allegations of jurisdiction to be amended in the trial or appellate courts) and Rule 21 in the Federal Rules of Civil Procedure (allowing district and appellate courts to dismiss a dispensable non-diverse party to remedy defective jurisdiction). The Tenth Circuit, however, has carved out its own exception, based on the occurrence of subsequent events, not recognized in decisions of this Court or other lower courts.

Thus, by misinterpreting *Carden*, the Tenth Circuit has created a conflict among the circuits regarding diversity jurisdiction and has set dangerous precedent to abrogate—without any guidance from this Court—a rule firmly established within the federal court system. To the extent the Tenth Circuit perceives a policy now of cutting back on diversity jurisdiction, that policy should be implemented by Congress—not by the Tenth Circuit's adoption of a new rule that conflicts with the decisions of other courts and creates widespread uncertainty.

U.S. 904 (1971); *Brough* v. *Strathmann Supply Co.*, 358 F.2d 374 (3d Cir. 1966).

[5] *See also Louisville, N.A. & C. Ry Co.* v. *Louisville Trust Co.*, 174 U.S. 552 (1899); *IMFC Professional Services of Florida, Inc.* v. *Latin American Homes Health, Inc.*, 676 F.2d 152, 157 (5th Cir. 1982) (subsequent changes in the citizenship of the parties); *St. Paul Mercury Indemnity Co.* v. *Red Cab Co.*, 303 U.S. 283, 289-93 (1938); *Anderson Thompson, Inc.* v. *Logan Grain Co.*, 238 F.2d 598, 601 (10th Cir. 1956) (reduction in the amount claimed to a sum below the jurisdictional amount).

II. THE TENTH CIRCUIT'S REFUSAL SIMPLY TO DISMISS THE NON-DIVERSE PARTY CONFLICTS WITH THIS COURT'S DECISIONS REGARDING PROCEDURES FOR CURING JURISDICTIONAL DEFECTS.

Apart from the conflicts described above, the Tenth Circuit's refusal simply to dismiss FMPO on rehearing, as requested by petitioners, also conflicts with this Court's decision in *Newman-Green, Inc.* v. *Alfonzo-Larrain*, 109 S. Ct. 2218 (1989). In particular, this Court held in *Newman-Green* that a court of appeals can and should dismiss a non-diverse dispensable party where the failure to dismiss that party would cause an unnecessary waste of time and resources.

Indeed, the concern expressed by this Court in *Newman-Green* regarding the imposition of unnecessary and wasteful burdens on the judicial system is particularly applicable in this case. Here, the district court has already completed a full trial on the merits and entered a verdict for approximately two million dollars.[6] There was no evidence or suggestion here that FMPO had originally been omitted from the litigation in order to create jurisdiction, since FMPO was created after the filing of the complaint. In addition, FMPO no longer had any interest in or relationship to the subject matter of the litigation when the Tenth Circuit rendered its decision. Moreover, unlike *Newman-Green*, where the dismissal ordered by this Court cured an original jurisdictional defect, diversity here concededly *was* appropriate at the outset and the dismissal would simply cure a "defect" that arose late in the case. *See* 109 S. Ct. at 2227.

In sum, the Tenth Circuit's failure to dismiss FMPO on rehearing as a dispensable party conflicts with the procedures required by this Court and sound judicial economy.

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[6] In *Newman-Green*, the district court had granted partial summary judgment for each party.

III. THE DECISION BELOW WILL FORCE IMMEDIATE CHANGES AND DISRUPTION OF BUSINESS DECISIONS AND WILL CREATE WIDESPREAD UNCERTAINTY IN LITIGATION.

Businesses and litigants both need a reasonable level of certainty regarding procedural and jurisdictional issues. Prior to the Tenth Circuit's decision, the rules regarding the establishment of diversity jurisdiction and the relevance of subsequent changes in jurisdictional facts were relatively well settled. Now, however, to comply with the Tenth Circuit's new rule, businesses will immediately have to reconsider their business and corporate structure decisions in order to avoid jeopardizing cases they have pending—or, as in this case, a judgment rendered—throughout the Tenth Circuit.

Unless reviewed by this Court, the decision below will turn routine business judgments into business risks. The district courts in a number of states obviously are bound to apply the Tenth Circuit's rule, not only to a transfer of assets to a limited partnership, but to a myriad of other significant business transactions. For example, under the Tenth Circuit's new rule, diversity would also be destroyed by such events as mergers or acquisitions, the conversion of existing businesses to a partnership form to raise additional capital, and other business expansions or restructuring.

Businesses in the Tenth Circuit will no longer be able to base their commercial decisions simply on the relevant business considerations, but instead will also have to account for whether their decisions would jeopardize jurisdiction—after the fact—in any litigation they have pending. If faced with the prospect of having to relitigate *all* pending federal cases, the deterrent effect on the conduct of business would be great, particularly for large, diverse businesses that make numerous decisions on a daily basis for prudent business reasons totally unrelated to pending litigation.

Furthermore, for businesses unable to conform their relationships immediately, the Tenth Circuit's decision creates tremendous uncertainty with regard to previously well-settled procedural rules governing diversity. Prior to the decision below, courts uniformly resolved jurisdictional questions concerning diversity—and established the appropriate forum—at the inception of the lawsuit. Now, in the Tenth Circuit, disruptive challenges to the court's jurisdiction can be mounted at any point in the proceeding. Parties in federal courts bound by the decision below will be faced with the looming threat of dismissal and the necessity to refile their lawsuit should the occurrence of subsequent events destroy diversity. Under the Tenth Circuit's rule, such subsequent events could include not only business transactions, but events that other courts have already found to have no effect on jurisdiction. *See* notes 3-5, *supra*.

Finally, the Tenth Circuit's decision will impose unnecessary and wasteful burdens on the parties, the courts, and other litigants awaiting judicial attention. *Newman-Green*, 109 S. Ct. at 2220. As is evident in the case at bar, the decision below will force parties to refile and relitigate cases after devoting years of effort to the litigation in federal court. Nothing but a waste of time and resources would be engendered by forcing these parties to begin anew. *Newman-Green*, 109 S. Ct. at 2226.

Because of the conflicts, the uncertainty, the disruption of business, and the waste of judicial resources caused by the Tenth Circuit's decision, review by this Court is warranted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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